Supreme Court, U.S.
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No. 97-984

In The

Supreme Court of the United States

October Term, 1997

REMINGTON INVESTMENTS, INC.,

Petitioner,

vs.

MOUSSA NIKBAKHT HAMEDANI, an individual,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal for the State of California, Second Appellate District, Division Two

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the California court of appeal, under an abuse of discretion standard, properly upheld the trial court's ruling that a declarant with no knowledge of the record-keeping practices of a bank was not qualified to testify as to whether the bank's records were business records.

2. Whether the California court of appeal properly ruled that the trial court did not abuse its discretion when it ruled that a note ledger (the "Note Ledger") which was untrustworthy on its face, introduced by a declarant with no knowledge of how it was prepared, was inadmissible to prove a borrower's indebtedness on a line of credit.

3. Whether the California court of appeal, under an abuse of discretion standard, correctly ruled that the trial court had properly denied summary judgment to a moving party plaintiff unable to produce admissible evidence in support of its causes of action.

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STATEMENT OF THE CASE

The petition contains several glaring misstatements. Most notably, both in its Questions Presented section and in its Statement of the Case, petitioner erroneously claims that the decision in the trial court and court of appeal turned solely on whether or not Remington could produce a custodian of records from Independence Bank, the failed bank.

Petitioner has misstated the record in asserting that the court of appeal and trial court held that a custodian of records from Independence Bank was required in order for the Note Ledger to be received in evidence. In fact, the court of appeal held:

> Plaintiff presented no evidence of the record-keeping practices of the bank during the period allegedly recorded on the Note Ledger, and hence presented no evidence of the manner in which the Note Ledger was prepared, the origin of the information it contained, etc. Plaintiff similarly did not attempt to lay any other foundation for admission of the Note Ledger by way of admission, estoppel, etc.

(App. 2a-3a).[1]

The court of appeal went on to explain why the Note Ledger was therefore inadmissible hearsay:

> The Note Ledger was claimed to record advances, payments, interest accruals, etc. It was submitted to prove the factual accuracy of the periodic events it

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1. References to the Petitioner's Appendix are marked as: ("App.__"). References to the Petition are marked as: ("Pet.__"). References to the Clerk's Transcript, the Record on Appeal, are marked as: ("CT __").

> allegedly recorded. It was therefore not admissible over a hearsay objection unless supported by the foundation specified in Evidence Code section 1271, consisting of elements designed to ensure its trustworthiness, or by some other foundation (i.e., admission, estoppel, etc.).

(App. 12a).

As the court of appeal recognized, Remington failed to introduce **any** admissible evidence whatsoever, "whether direct or circumstantial, admitted into evidence by way of one foundation or another." (App. 13a).

Petitioner inaccurately maintains that Hamedani disputed the balance shown on the Note Ledger solely on the ground that Remington could not provide a custodian of records from the bank to lay a foundation. (Pet. 2-3). To the contrary, Hamedani raised many defenses in the trial court, including the evidentiary objections to Sean Klingle's declarations and the Note Ledger. (CT 73). Nor, as petitioner mistakenly asserts, were Hamedani's evidentiary objections to the Declarations of Sean Klingle and the Note Ledger based on the fact that "Mr. Klingle had not worked for Independence Bank." (CT 146, 165-169). As Hamedani argued, and as the trial court and court of appeal have agreed, proper foundation was not laid for admission of the Note Ledger. Such foundation could have come from the testimony of an Independence Bank custodian of records or other employee familiar with the bank's record-keeping practices, or from someone else with personal knowledge as to the record-keeping practices of the bank.

Additionally, the petition omits several important facts regarding the untrustworthiness of the Note Ledger which were noted by the court of appeal. As the court of appeal observed,

the ledger was a document filled out by hand that purported to cover twelve months. (App. 2a). There were several columns of the ledger that were left totally blank. As to those columns of the ledger which were filled out, the numerical entries all lined up neatly, and appeared to be one person's handwriting. (CT 135). This leads to the inescapable conclusion that the ledger was a summary document prepared after the fact, rather than a record filled out periodically at the time of each transaction.

The ledger was missing essential data in several columns: there were no entries in the columns labeled: "requested by", "written/oral", "auth. by" and "principal payment." (CT 135). It appeared, both from the presence of these column headings and from the language of the promissory note, that the bank's regular course of doing business was to require a bank employee to state who was requesting an advance on the line of credit, whether the request was written or oral, and who had authorized the advance. (CT 6, 135). As the appellate court noted, there was a notation that one interest payment was reversed as "nsf" but there was no subsequent adjustment either to the loan balance or the one subsequent interest payment recorded on the ledger. (App. 2a; CT 135). There was also a mathematical error: the recorded advances total only $102,000, while the Note Ledger shows a final loan balance of $104,000. (App. 2a; CT 135).

Contrary to petitioner's assertion, the court of appeal did not state that courts can pick and choose which bank documents are admissible. The court of appeal did make a distinction between the "Promissory Note" and the Note Ledger, but not, as petitioner claims, based on the former's being admissible without a custodian of records declaration and the latter being admissible only with such a declaration. (Pet. 6). Rather, the distinction was between requirements for authentication (pursuant to California Evidence Code § 1400 *et seq.*) and for

admission of a business record over a hearsay objection. The court of appeal observed that the Promissory Note was submitted as an operative contractual document and was not offered to prove the amount owed, whereas the Note Ledger was being offered to prove "the factual accuracy of the periodic events it allegedly recorded." (App. 12a).

REASONS FOR DENYING THE WRIT

I.

THERE IS NO COMPELLING REASON FOR SUPREME COURT REVIEW.

This petition fails to meet the criteria for United States Supreme Court review as set forth in Rule 10 of the Supreme Court Rules. The California Supreme Court denied petitioner Remington's petition for review and the court of appeal's ruling did not conflict with any other California appellate court ruling.

Although Remington seeks to create a conflict of authority, it fails to cite any published decisions in either state or federal court that are contrary to the opinion in this case. Remington also ignores the fact that the court of appeal decision comports with prevailing authority in California, as well other jurisdictions.[2] In short, the court of appeal properly ruled in accordance with long established California law concerning the rules of evidence and the requirements for admissibility under the business records exception to the hearsay rule, California Evidence Code § 1271. The ruling is in keeping with the decisions of other jurisdictions facing the same issues under similar evidentiary rules. As is explained more fully below, the

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2. *See, e.g., The Cadle Co. v. Phillips*, 120 N.M. 748, 906 P.2d 739 (N.M. App. 1995); *Sholdra v. Bluebonnet Savings Bank*, 858 S.W. 2d 533 (Ct. App. Tx. 1993).

ruling does not conflict with any of the cases cited by petitioner involving the *D'Oench Duhme* doctrine or the related federal statutes.[3]

Petitioner has cited no published federal court decisions which have reached contrary results. As to the unpublished decisions referenced in the petition, petitioner has failed to point to any which involve a note ledger for a revolving line of credit or other similar factual scenarios. Neither the law nor the facts warrant questioning of the appellate court's eminently correct decision.

II.

THE *D'OENCH DUHME* DOCTRINE AND 12 U.S.C. § 1823 DO NOT APPLY.

Remington's claim that there is a conflict between federal law as found in the *D'Oench Duhme* Doctrine and in 12 U.S.C. § 1823, and California law on evidence, is an issue that was already thoroughly analyzed and dealt with by the court of appeal. The appellate court correctly determined that there is no such conflict, and that Remington's interpretation of the federal authorities is erroneous and not intended by Congress. (App. 3a-6a). The trial court and court of appeal found, and petitioner cannot contend otherwise, that the *D'Oench Duhme* Doctrine and 12 U.S.C. § 1823 come into play when there are defenses of side agreements, misrepresentations, or omissions. No such defenses were involved in the trial court's decision in this case. In fact, the trial court's denial of summary of judgment to Remington was based on the fact it could not establish the amount of money owed by Hamedani. (App. 6a).

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3. Neither *D'Oench Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942) nor *Langley v. FDIC*, 484 U.S. 86 (1987) concern the issues raised in the case at bar.

Nor does petitioner's convoluted argument concerning the purported lack of fealty of a disgruntled bank officer create a proper ground for invoking the *D'Oench Duhme* doctrine and 12 U.S.C. § 1823(e)(1). Petitioner believes that a bank officer who has presumably lost his or her job at a failed bank would have reason to give false testimony concerning a proffered business record. (Pet. 7, 19). However, under petitioner's theory, a currently employed bank officer of a thriving bank would have equal incentive to lie in favor of his or her employer. Brought to its logical conclusion then, the standards for admission of a business record as set forth in Evidence Code § 1271 and similar state and federal statutes should be done away with completely because one could not trust any custodian of records to tell the truth.

III.

REMINGTON'S INTERPRETATION OF 12 U.S.C. § 1820(f) IS ERRONEOUS.

Nor, contrary to petitioner's brief, is admission of the Note Ledger mandated by 12 U.S.C. § 1820(f). Under petitioner's illogical reading of this statute, any copy of a document in a failed bank's files automatically becomes admissible to prove the purported content, after the bank's files are transferred to the FDIC. As the appellate court recognized, such an interpretation would have the absurd effect that copies of bank records would automatically be admissible without establishing foundation even when the originals are not. (App. 8a). Moreover, under petitioner's reading of the statute, the FDIC or its assignee would be guaranteed of receipt of the documents into evidence even though the same documents, presented by the failed bank at an earlier date when it was still in operation, would not have been admissible. Thus, petitioner's conclusion that the appellate decision contradicts this federal statute is unwarranted.

IV.

12 U.S.C. § 1821 DOES NOT AFFECT ADMISSIBILITY ISSUES.

In the petition to this Court, petitioner raises for the first time an argument based on 12 U.S.C. § 1821, that the FDIC became the custodian of the bank records and therefore any and all documents in the bank's files are automatically admissible. Under California law, and indeed under the Federal Rules of Evidence, a custodian of records declaration by itself is not sufficient to overcome a hearsay objection to business records.

In *Taggart v. Super Seer Corp.*, 33 Cal. App. 4th 1697, 40 Cal. Rptr. 2d 56 (1995), the court noted that the streamlined method for production of records of a business in response to a subpoena duces tecum set forth in Cal. Evidence Code § 1560 *et seq.* does not bring the records within the business records exception to the hearsay rule, embodied in section 1271.

As the *Taggart* court observed:

> It will readily be seen that a custodian's declaration may state all the matters it is required to state under section 1561, yet fail to provide a sufficient foundation for admission of the records under section 1271. (Citations omitted). Most significantly, the custodian's declaration is not required to state the "identity" or "mode of preparation" of the records. As a result, it will usually fail to show that "[t]he sources of information and method and time of preparation" of the records indicate their trustworthiness. "Therefore, in the face of a hearsay objection, the affidavit of the custodian, made

> pursuant to [section] 1561, does not satisfy the requirements of the business-records exception to the hearsay rule set forth in [section] 1271(c)-(d), and the copy of the business record, produced pursuant to [sections] 1560-1561, is inadmissible hearsay." ([1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 2d ed. 1982) Business Records] § 4.1, pp. 212-213).

33 Cal. App. 4th at 1706. The court went on to observe that the Legislature has expressly made admissibility under section 1562 conditional on satisfying the business records exception of section 1271:

> . . . We conclude that the Legislature did so intentionally, to prevent the wholesale admission of hearsay lacking any guarantees of reliability or trustworthiness. A contrary construction would create a hole in the business records exception big enough to drive a truckload of hearsay through; the proponent of a business record who could not show how it was prepared, or who knew that the way it was prepared would indicate that it was untrustworthy, could nevertheless introduce the record into evidence.

Id. at 1708.

Trustworthiness of records is the key to this case. Petitioner would have this Court believe that what troubled the trial court and court of appeal was the mere fact that Remington had failed to produce a body, *i.e.*, the custodian of records of the failed bank. But a review of the record and appellate opinion leaves no doubt that the result did not hinge simply on the fact that Sean Klingle didn't work for Independence Bank. What the

courts were looking for, and did not find, were "normal standards of reliability." (App. 6a). Indeed, under Fed. R. Evidence Rule 803(6) as well as California Evidence Code § 1271, the paramount requirement for admissibility of business records is trustworthiness. *See Miss. River Grain Elevator, Inc. v. Bartlett & Co. Grain,* 659 F.2d 1314 (5th Cir. 1981), cited in Petition at 17-18. Thus, there may be circumstances where business records come into evidence without testimony of the party who kept the records or supervised their preparation. The Note Ledger is not trustworthy just because Sean Klingle received it in a packet transferred from the failed bank to the FDIC and then to Remington.

V.

THERE IS NO CERTAINTY ON THE FACE OF THE "NOTE" AS TO THE AMOUNT OF FUNDS ADVANCED.

As the court of appeal correctly held, a conditional "promissory note" on a revolving line of credit is not equivalent to an unconditional promissory note in a fixed amount that is canceled upon repayment of the face amount, in regard to the presumption of Cal. Evidence Code Section 635. (App. 10a-11a). While there is a "near certainty" that the face amount of a promissory note in a fixed amount is advanced when the note is made (App. 11a), in this case, it is uncertain what amount was paid out to Hamedani. Thus, the trial court was correct in rejecting the Note Ledger since there was no evidence as to either the amount of money withdrawn by Hamedani or the amounts paid back.

CONCLUSION

This is not a case of a state court failing to accede to federal preemption. It is highly likely that, given the identical facts of this case, a federal court would have ruled the same way. There are threshold standards for admissibility of business records. Those standards are clearly set forth in the evidentiary rules of state and federal courts, and in the case law interpreting them. In enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Congress did not decree that it was supplanting those evidentiary statutes.

For all of the reasons stated herein, Respondent respectfully requests that this Court deny Remington's Petition for Writ of Certiorari.

Respectfully submitted,

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